No. 12,771

IN THE

United States Court of Appeals

For the Ninth Circuit

THELMA D. HAYES,
Appellant,

vs.

FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Louis D. Colbert, Deceased,
Appellee.

Appeal from the United States District Court for the Territory of Alaska, Fourth Division.

BRIEF OF APPELLEE.

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STATEMENT.

On the 7th day of October, 1946, Louis D. Colbert signed a power of attorney appointing Thelma D. Hayes, who owned and operated the Graehl Circle Bar in Fairbanks, Alaska, his attorney-in-fact. (T.R. 282-283.) On the 8th day of October, 1946, the said Louis D. Colbert visited the office of Dr. Schaible for a treatment and on the 9th day of October, 1946, he returned to the doctor's office and the doctor recommended that he go to the hospital. Arrangements were made by the doctor and Mr. Colbert became a

patient in the hospital on the 9th day of October, 1946. (T.R. 190-191.) That on the 16th day of October, 1946, the said Thelma D. Hayes, acting under the said power of attorney, made her first withdrawal in the sum of One Hundred Dollars ($100.00) from the account of the said Louis D. Colbert in the First National Bank of Fairbanks, Alaska. (T.R. 310.) On the 17th day of October, 1946, Warren A. Taylor, as a notary public, took the acknowledgement of the said Louis D. Colbert to said power of attorney. (T.R. 114, 283-284.) On the 22nd day of October, 1946, in the early morning and shortly after midnight L. D. Colbert signed what was purported to be his Last Will and Testament. The names of V. A. Cobbell and Arthur A. Benz of Fairbanks, Alaska, appeared on the will as witnesses. (T.R. 280-281-282.) In the afternoon of October 22, 1946, the said Louis D. Colbert executed what was purported to be his Last Will and Testament. The names of James F. Haynes, Arthur A. Benz and V. A. Cobbell of Fairbanks, Alaska, appeared on the will as witnesses. (T.R. 278-279-280.) On the 23rd day of October, 1946, the said L. D. Colbert signed a letter directed to the Fairbanks Agency authorizing Thelma Hayes to have access to his safe deposit box, which letter was witnessed by Kenneth D. Wire and Arthur A. Benz. (T.R. 286.)

On the 23rd day of October, 1946, the First National Bank of Fairbanks, Alaska, signed a petition for appointment as guardian to take the care, custody and management of the estate of Louis D.

Colbert, an incompetent person. (T.R. 272-273-274.) After a hearing upon said petition on the 15th day of November, 1946, findings of fact, conclusions of law and judgment were signed by the judge of the Probate Court for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, appointing said bank guardian to take the care, custody and management of the estate of Louis D. Colbert, an incompetent person. (T.R. 261, 262, 263, 264, 265, 266, 267.)

Louis D. Colbert died on the 25th day of May, 1947, and on the 27th day of May, 1947, the First National Bank of Fairbanks, Alaska, was appointed executor under a will which had been executed on the 14th day of November, 1938. (T.R. 276, 277.) On the 1st day of August, 1947, the appellant filed a petition to revoke the Letters Testamentary and the bank filed its answer on the 18th day of August, 1947. The case was tried by the judge of the Probate Court on the 16th day of June, 1950, which was after a motion was filed by the bank to dismiss the case for want of prosecution.

The judgment and order of the District Court from which this appeal is taken is not included in the transcript of record.

POINTS AND AUTHORITIES.

In Re Strong (1917) 166 N.Y.S. 862, where it appeared that the testatrix two years prior to the execution of the codicil to her will developed arterio-

sclerosis, which was progressive, and became subject to physical attacks or seizures accompanied with convulsions which sometimes caused her to fall and rendered her unconscious for several hours, with effects continuing longer, which attacks occurred with varying frequency, usually three times a week, sometimes with an interval of two weeks between, and continued until her death, it was held that the burden of proof rested on the proponents of the will to establish mental capacity of the testatrix at the time of the execution of the codicil. (168 A.L.R. 998.)

(1) It should be noted at the outset that Rule 53 (e)(2) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c, provides that "* * * the Court shall accept the master's findings of fact unless clearly erroneous." While that rule applies solely to the District Courts, we think it should be applied here by analogy, especially if it conforms with the general practice existing before the promulgation of that rule. We have applied Rule 41, by analogy, to practice in this Court. (*National Labor Relations Board v. Remington Rand, Inc.,* 130 F. (2d) 925; *In re Barnett,* 2 Cir., 124 F. (2d) 1005, 1013; *National Labor Relations Board v. Arcade-Sunshine Co., Inc.,* 132 F. (2d) 8; *United States v. Wells et al., Executors,* 283 U.S. 120; Supplementing Annotation in 7 A.L.R. 575). The rule that proceedings for the appointment of a guardian or conservator are admissible upon the question of the ward's mental condition was stated in the earlier annotation. It has since been held that a proceeding

for appointment of guardian for a mental incompetent less than a year subsequent to execution of a will is admissible on the question of progressive mental disease antedating the execution of the will. (*Re Austin* (1922) 194 Iowa 1217, 191 N.W. 73, 68 A.L.R. 1312, 159 Fed. 55.)

The credibility and weight of evidence are questions for the jury. (*Re Estate of Ida E. Forsythe, Deceased, Mary Clabots et al., Respts., v. G. I. Badeaux et al., Appts.,* 221 Minn. 303, 167 A.L.R. 1, 22 N.W. (2d) 19.)

Errors alleged in the findings of the Court are not subject to reversion by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made. (*Tooley v. Pease,* 180 U.S. 131; *Hathaway v. National Bank,* 134 U.S. 498; *St. Louis v. Retz,* 138 U.S. 241; *Runkle v. Burnham,* 153 U. S. 225.)

There was no error in submitting the question of testator's insanity to the jury with the instruction that if they found that the insanity was permanent in its nature and character the presumptions were that it would continue and the burden was on those holding under the will to satisfy the jury that he was of sound mind when it was executed. (*Keely v. Moore,* 196 U.S. 39; 57 Am. Jur. 97, Sec. 89; 68 C.J. 446, Sec. 44; 57 Am. Jur. 125, Sec. 133.)

In contest of a will on ground of alleged incompetency of testatrix, testimony of subscribing witnesses who were lawyers who drew the will and who

had never seen testatrix prior to date on which will was drawn was not conclusive of competency of testatrix to make a will, and their testimony could be overcome by other testimony showing condition of mind of testatrix a reasonable time before and after execution of will. (*Ergang et al. v. Anderson et al.,* 38 N.E. (2d) 26.)

A person who is not an expert may give his opinion concerning mental capacity of a testator if it appears that such witness has an acquaintance with person whose competency is in question and relates facts and circumstances which afford reasonable ground for determining soundness or unsoundness of mind of such person and jury may give such value to opinion so expressed as capacity, intelligence and observation of witness who forms it may warrant. (*Ergang et al. v. Anderson et al.,* 38 N.E. (2d) 26.)

Where the issue is the mental capacity of a testator at the time of making a will, evidence of incapacity within a reasonable time before and after is relevant and admissible. (*In re Bullard's Estate, McAllister et al. v. Rowland,* 144 N.W. 412.)

When such a judgment is rendered in proceedings instituted after the will is made, and does not find the testator incompetent at such prior time, it is competent evidence, and whether it should be admitted depends upon its probative value as tending to prove as would other evidence of the mental condition of the testator at subsequent time. Whether it has probative value, or is too remote, is largely

for the trial Court to determine. In this case, the decision of the trial Court that the exclusion of such judgment was prejudicial error is sustained. (*In re Bullard's Estate, McAllister et al. v. Rowland,* 144 N.W. 412.)

ARGUMENT.

The record shows that Eleanor M. Ely, as United States Commissioner and ex officio Probate Judge, after a hearing, appointed the First National Bank of Fairbanks, Alaska, as guardian to take the care, custody and management of the Estate of Louis D. Colbert, an incompetent person, and entered findings of fact, conclusions of law and a judgment based upon the testimony introduced at the hearing.

The findings of fact, conclusions of law and judgment upon the trial of this case were entered by Clinton B. Stewart, who was the United States Commissioner and ex officio Probate Judge at the time of the first trial of this case. Upon the appeal to the District Court the testimony entered in the Probate Court was considered, as well as the additional testimony of witnesses who testified at the trial in the District Court. It is evident from the findings of fact, conclusions of law and judgment which were entered as a result of these trials that the testimony introduced on behalf of the appellant was not believed by the judges of the above-entitled Courts. All of the witnesses testified on behalf of appellant that the mind of Louis D. Colbert was as clear as a bell

and that there were no signs of insanity at any time he was observed by these witnesses. If the testimony of appellant's witnesses were true there would be no question as to his sanity. It is evident that the trial Courts were impressed with the truth of the testimony of appellee's witnesses. In view of the authorities, it would seem that it was the providence of the trial Court to determine the credibility of the witnesses. They had an opportunity to observe their appearance upon the stand, the manner in which they testified and the reasonableness of their testimony. Where the testimony is absolutely conflicting as it is in this case, it is the duty of the trial Court to determine the truth.

If the witnesses in this case, who testified on behalf of the appellee, were telling the truth the only question which can arise is whether or not the evidence offered is sufficient to justify finding that Louis D. Colbert was not of sound and disposing mind and memory and capable of executing a will.

It will be observed from the testimony that Arthur A. Benz, who was in the employ of appellant as a bartender and whose name appears on the power of attorney as a witness, and also on the wills which were prepared by Warren A. Taylor, attorney for appellant, was unable to remember when he witnessed the will, which is marked as Exhibit "D", and which according to the testimony of Mr. Taylor was prepared by him on the afternoon of October 21, 1946, and was not signed until shortly after midnight on

October 23. It would seem that there was some reason in the mind of Mr. Benz why he should not say that he went to the hospital shortly after midnight to witness said will. There was no attempt made by Mr. Taylor to explain why it was necessary to wait until after midnight before taking the will to the hospital. From the record it is not clear as to who retained possession of the will or how, when or by whom the interlineations were made which were claimed to have been initialled by Mr. Colbert. This first will, as well as the second one, were also witnessed by Mr. V. A. Cobbell, who did not appear at the trial of the case as a witness.

The power of attorney above referred to and signed by Louis D. Colbert on the 7th day of October, 1946, according to the testimony of Warren A. Taylor, attorney for appellant, was prepared by him at the request of Louis D. Colbert. The record is silent as to when he prepared the power of attorney and as to where it was signed by the said Louis D. Colbert. There is nothing in the record to show when Mr. Taylor was requested to prepare the power of attorney by Mr. Colbert and no reason was given as to why the instrument was not signed by Mr. Colbert at the time it was prepared. Thelma D. Hayes first used the power of attorney on the 16th day of October, 1946, at which time she had it in her possession and according to the testimony of Mr. Taylor it was acknowledged by him on the 17th day of October, 1946, while Mr. Colbert was in the hospital.

There is nothing to show why it was necessary for Mr. Taylor to go to the hospital on the 17th day of October to acknowledge the power of attorney, or who requested him to go, or who was present at the time it was acknowledged. There was no evidence as to his condition on the 17th day of October, 1946, by any of the witnesses who witnessed the power of attorney or by appellant or any of her witnesses.

The record discloses that on the 16th day of October, 1946, Thelma D. Hayes, under the power of attorney, withdrew $100.00 from the account of Louis D. Colbert in the First National Bank, $100.00 on the 18th day of October, 1946, and $100.00 on the 22nd day of October, 1946. The Exhibit "N" introduced by appellant shows that appellant entered into an agreement on the 23rd day of September, 1946, with L. D. Colbert which was in connection with the assignment of a judgment secured by Allison against Thelma D. Hayes, and that Thelma D. Hayes promised and agreed to pay to Louis D. Colbert the sum of $200.00 per month until the full amount of $3,556.39 had been paid, and the contract also provided for an additional payment of $300.00 on the 1st day of January, 1947. No claim was made by Thelma D. Hayes that she ever made any of these payments and no excuse was offered as to why she failed to make the payments, and no satisfactory explanation was ever made as to what she did with the money withdrawn from the account of Louis D. Colbert. The evidence shows that the reason that it

was necessary for the bank to apply for appointment as guardian was the fact that she was withdrawing Mr. Colbert's money from the bank and the further fact that it was reported that Mr. Colbert was of unsound mind and unable to look after his own affairs.

The testimony of Dr. A. J. Schaible shows that Mr. Colbert first came to him for medical attention in 1933. He testified that he had been called on many occasions to observe and testify regarding persons accused of being insane. Under the practice in Alaska it is necessary for a physician to observe and testify in regard to persons so accused. He testified that he saw Louis D. Colbert every day from the time he was sent to the hospital on the 9th day of October up to the 20th day of November, 1946. (T.R. 192.) It was the doctor's opinion that Mr. Colbert was not of sound and disposing mind and memory and that he was not capable of executing a will. Considering his training in connection with cases of this kind it would seem that he was better qualified to testify as to the sanity of Mr. Colbert than any other witness. The witnesses, Mike Stepovich, Julien A. Hurley, Harvey Van Hook, James E. Barrack, Arthur Luthrow and Frank Young, friends and acquaintances of Lou Colbert, all testified in effect that in their opinion from their observations of Mr. Colbert after he entered the hospital and during the month of October, that he was not of sound and disposing mind and memory.

The authorities hold that the question of the competency of a person to execute a will must be determined entirely upon the particular facts of each case. There seems to be no exact or binding rule by which the Court in cases of this kind are to be governed.

In view of all of the evidence in the case and the fact that all of the witnesses, with the exception of the taxi driver, who gave any testimony on behalf of appellant as to the condition of Mr. Colbert at the time the wills were executed in October, 1946, were in the employ of the appellant, and the further fact that Mr. Cobbell was not called as a witness undoubtedly influenced the decision of the probate judge and the district judge in denying the petition of appellant.

There is no satisfying evidence of any kind as to why Mr. Colbert should have left his property to Thelma D. Hayes instead of his sister and niece, and we believe the judgment of the District Court should be affirmed.

Dated, Fairbanks, Alaska,
May 16, 1951.

Respectfully submitted,
JULIEN A. HURLEY,
Attorney for Appellee.

I hereby certify that I mailed a typewritten copy of the foregoing Brief of Appellee to J. L. McCarrey, Jr., Anchorage, Alaska, on this 12th day of May, 1951.

JULIEN A. HURLEY,
Attorney for Appellee.